

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Complaint of Fiber Technologies Networks, LLC	)	D.T.E. 01-70
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**(Third) Motion of Shrewsbury’s Electric Light Plant  
to Compel Responses to Information Requests**

Introduction

Pursuant to 220 C.M.R. 1.06(6)(c)(4) and for the reasons stated herein, Shrewsbury’s Electric Light Plant (“SELP”) moves that the Department of Telecommunications and Energy (“Department” or “DTE”) compel Fiber Technologies Networks, LLC (“Fibertech”) to respond to certain information requests set out below.

Background

This is the third motion to compel filed by SELP in connection with Fibertech’s refusal to provide documents related to its customers, including its leases with those customers. As set forth in the prior two motions to compel filed by SELP, these documents are essential to a fair and speedy resolution of Fibertech’s complaint. For the reasons set forth in those prior motions, Fibertech cannot refuse to provide information related to matters that it has specifically placed at issue in this proceeding through the testimony of its witnesses. See e.g., Second Motion to Compel, p. 2. Thus, as with its second motion to compel, in the interests of administrative economy and efficiency, SELP will refer to and incorporate by reference, where appropriate, the legal and factual arguments set forth in its first motion to compel responses to information requests dated November 20, 2001.

Argument on (Third) Motion to Compel

**Information Request**

*SELP 2-7: Please refer to Mr. Chiaino's testimony at page 3. For each area in New York in which Fibertech has a "completed network," please*

- (a) provide a description of that network (length, transmission capabilities, capacity levels);*
- (b) when construction was completed;*
- (c) whether the fiber has been "lit" (and, if so, how, how much, when, and by whom);*
- (d) a list of customers on the completed network;*
- (e) whether all or any part of the completed network has been or currently is leased (and, if so, the date of the lease, the name of lessee and a description of the lease terms); and*
- (f) whether any portion of the completed network has been sold (and, if so, a description of the sale, the name of the purchaser and the date of the sale).*

*RESPONSE: (a) Syracuse: 42 miles, 72 count; Rochester: 115 miles, 72 count; Buffalo: 66 miles, 72 count; Albany: 113 miles, 72 count.*

*(b) Syracuse was completed 04/01, Rochester was completed 08/01, Buffalo was completed 10/01, and Albany was completed 10/01.*

*(c) Fibertech objects to providing specific information as to what customers have lit what fiber because that information is competitively sensitive. Subject to this objection, the following segments have been lit as follows: Pittsburgh Segment in 10/01; Syracuse in 02/01, 05/01 and 10/01, Rochester Ring 1 in 07/01 and Rochester Ring 2 in 10/01; Buffalo in 10/01; Albany in 06/01, 09/01 and 10/01.*

*(d) Fibertech objects to producing a list of such customers on the grounds that they are irrelevant to the issues in dispute and that the identification of where customers are providing service is competitively sensitive and proprietary to the customers as well as Fibertech, and therefore confidential.*

*(e) Yes. Fibertech objects to producing such lease terms on the grounds that they are irrelevant to the issues in dispute and that certain of these leases terms are competitively sensitive and therefore confidential. The lease terms are for dark fiber, and since there is no dispute that Fibertech is a dark fiber carrier and it is SELP's position that a dark fiber carrier is not a "licensee" within the meaning of G.L. c. 166 § 25A, the lease terms are therefore immaterial. In this light, the burden of seeking protective*

*treatment or obtaining authorization from Fibertech's customers to produce outweighs any marginal probative value of the lease terms. Fibertech further objects to producing leases of customers that do not do business in Massachusetts.*

*(f) None have been sold.*

Fibertech's objection to subparts (d) and (e) of this request is completely baseless. First, the prefiled testimony of Frank Chiaino already refers to *some* of Fibertech's customers. For example, Fibertech refers to the Choice One agreement, and agreements with other companies, such as CTC, AT&T, Qwest, Allegiance, Global Crossings, Connecticut Telephone and the State of Connecticut as examples of Fibertech's current "customers" (Chiaino Testimony, p. 4, lines 12-14). Scott Lundquist's prefiled testimony claims that Fibertech's dark fiber is used in the provision of "competitive telecommunications services in Massachusetts" (Lundquist Testimony, p. 19, starting at line 13.)

Thus, Fibertech has put its customers into issue repeatedly by referring to the leases with such customers. It is unclear why it refuses now to provide a complete list of such customers. As set forth in the prior motions to compel, the centrality of this information to Fibertech's arguments cannot be overstated: it underlies the basis of its claims that it provides a "telecommunications" service to customers. SELP and the Department are entitled to know who Fibertech's customers are, and to review their agreements with Fibertech. Clearly, the agreements will contain information relevant to this dispute, and the agreements will also indicate those entities that are Fibertech's customers. Thus, for these reasons, and the reasons set forth in its prior motions to compel (see, e.g., arguments under Second Motion to Compel, requests 2-6 and 2-12, regarding Fibertech's leases and customer agreements), the Department should compel responses to SELP 2-7(d) and (e).

Finally, SELP has reminded Fibertech previously that it is under a continuing duty to supplement information request responses when information becomes available. Fibertech's press releases are indicating that portions of its New York network were sold weeks ago. Accordingly, SELP is still waiting for an updated response to SELP 2-7(f).

### **Information Request**

*SELP 2-8: Please refer to Mr. Chiaino's testimony at page 3. With respect to the partially completed networks in Hartford and Pittsburgh, please*

- (a) provide a description of that network (length, transmission capabilities, capacity levels);*
- (b) when construction was completed;*
- (c) whether the fiber has been "lit" (and, if so, how, how much, when, and by whom);*
- (d) a list of customers on the completed network;*

- (e) *whether all or any part of the completed network has been or currently is leased (and, if so, the date of the lease, the name of lessee and a description of the lease terms); and*
- (f) *whether any portion of the completed network has been sold (and, if so, a description of the sale, the name of the purchaser and the date of the sale).*

**RESPONSE:** (a) *Pittsburgh: 150 miles, 96 count; Hartford: 152 miles, 96 count.*

(b) *Pittsburgh: 4 miles completed to date; Hartford: 3 miles completed to date.*

(c) *Fibertech objects to providing specific information as to what customers have lit what fiber because that information is competitively sensitive. Subject to this objection, the following segments have been lit as follows: Ring 6 on 09/01; Hartford on 10/01.*

(d) *See Response to SELP 2-7 (d).*

(e) *Please see Response to SELP 2-7 (e).*

(f) *None have been sold.*

SELP repeats and incorporates by reference its legal and factual argument in support of compelling a response to SELP 2-7(d) and (e), above.

### **Information Request**

**SELP 2-9:** *Please refer to Mr. Chiaino's testimony at page 3. With respect to the construction described as "networks in progress", please*

- (a) *provide a description of the status of construction of that network, a description of the current plans for that network when completed (length, transmission capabilities, capacity levels);*
- (b) *when construction is estimated to be completed; whether any fiber has been "lit" (and, if so, how, how much, when, and by whom);*
- (c) *a list of customers or potential customers who have executed agreements with respect to these "networks in progress";*
- (d) *whether all or any part of the yet to be completed network is subject to a lease or other agreement (and, if so, the date of the lease or agreement, the name of lessee or party signing the agreement), and*
- (e) *a description of the lease or agreement terms, and whether any portion of the to be completed network has been sold or optioned (and, if so, a description of the sale or option, the name of the purchaser and the date of the sale or option).*

*RESPONSE: (a) New Haven: 152 miles, 72 count; Columbus: 96 miles, 72 count; Indianapolis: 141 miles, 72 count; Providence: 90 miles, 81 count; Springfield: 68 miles, 72 count; Worcester: 107 miles, 72 count.*

*(b) New Haven: 03/02; Columbus: 12/02; Indianapolis: 01/02; Providence 02/02; Springfield: 03/02; Worcester: 03/02.*

*(c) See Response to SELP 2-7 (d).*

*(d) No.*

*(e) Please see Response to SELP 2-7 (e).*

SELP repeats and incorporates by reference its legal and factual argument in support of compelling a response to SELP 2-7(d) and (e), above.

### **Information Request**

*SELP 2-10: Please refer to Mr. Chiaino's testimony at page 4. To the extent not otherwise explained in Fibertech's response to Information Request 2-7 through 2-9, above,*

- (a) please list and describe all "customers on all four networks" in New York, including, at a minimum, a description of the nature of the service provided to each customer, whether the dark fiber associated with this customer has been lit and, if so, how, how much, when, and by whom, and*
- (b) please list all customers associated with the completed portions of the Hartford and Pittsburgh networks, including, at a minimum, a description of the nature of the service provided to each customer, whether the dark fiber associated with this customer has been lit and, if so, how, how much, when, and by whom.*

*RESPONSE: Please see responses to 2-7, 2-8 and 2-9.*

SELP repeats and incorporates by reference its legal and factual argument in support of compelling a response to SELP 2-7(d) and (e), above.

### **Information Request**

*SELP 2-11: Referring again to Mr. Chiaino's testimony at page 4, if the answers to Information Requests 2-7 through 2-10, above, indicate that Fibertech has no customers on its Hartford and Pittsburgh networks, please explain how Fibertech*

*is “providing service over the completed portions of the Hartford and Pittsburgh networks.”*

*RESPONSE: Please see responses to 2-7, 2-8 and 2-9.*

Fibertech’s response to SELP 2-11 is completely non-responsive. Fibertech never answers questions in SELP 2-7, 2-8 and 2-9 regarding its customers, let alone information on how Fibertech is supposedly providing service over completed portions of its networks. For the reasons set forth in its legal and factual argument in support of compelling a response to SELP 2-7(d) above, Fibertech’s response to SELP 2-11 should be compelled.

### **Information Request**

*SELP 3-11 Please refer to page 10 of Mr. Lundquist’s testimony. How is the Global NAPS case referred to relevant to a pole attachment dispute under G.L. c. 166, § 25A?*

*RESPONSE: Please refer to SELP’s response to Fibertech 1- 20.*

SELP’s response to Fibertech 1-20 cannot serve as a response to a question raised directly by Mr. Lundquist’s prefiled testimony. For the Department’s convenience, here is the text of Fibertech 1-20 and the response:

**FIBERTECH 1-20: Please refer to Paragraph 28 of the Response of Shrewsbury Electric Light Plant in this matter. Explain why the Global NAPS cases are irrelevant to the instant matter.**

**RESPONSE: SELP objects to this request on the grounds that it calls for a legal conclusion.**

First, with regard to SELP 3-11, it is Lundquist’s testimony that cites the Global NAPS case. Once again, Fibertech has made the decision to present testimony of witnesses that discuss legal matters such as application of laws and precedent to Fibertech’s case. This is Fibertech’s choice. If Fibertech claims that questions on such testimony call for conclusions of law, as it has rather indirectly here (by referring to SELP’s response Fibertech 1-20), then the portion of the testimony that expounds on legal theories and the like must be stricken. Clearly, Mr. Lundquist is not qualified to testify as to the effect of Global NAPS on dark fiber if he cannot explain how it is relevant to the instant proceeding, *i.e.*, why he bothered to mention it in his testimony in the first place.

Further, SELP’s Response to Fibertech’s Complaint mentioned that Global NAPS was irrelevant to the instant proceeding only because it was cited in Fibertech’s Complaint as actually controlling on this matter. SELP’s witness did not opine on the Global NAPS case. Thus, when Fibertech attempted to conduct discovery on SELP’s legal argument in its Response to Fibertech’s Complaint, it could well expect that SELP would decline to offer a conclusion of law in response to such discovery. Fibertech’s response to SELP 3-11 is unresponsive and not made in good faith. If the

parties were in court on this matter, undoubtedly, SELP would be entitled to costs on this motion under the civil rules of procedure.

## Information Request

*SELP 3-14 Please refer to page 20 of Mr. Lundquist's testimony.*

- (a) Are the Choice One Master Facilities and other Agreements that Fibertech has with customers privately-negotiated contracts?*
- (b) If the answer to SELP 3-14(a) is yes, please describe whether the provision of dark fiber under such arrangements constitutes the offering of dark fiber on a "common carrier" basis.*

*RESPONSE: (a) Fibertech objects to producing such information on the grounds that is irrelevant to the issues in dispute and that this information is competitively sensitive and therefore confidential. In this light, the burden of seeking protective treatment or obtaining authorization from Fibertech's customers to produce outweighs any marginal probative value of this information. Fibertech further objects to producing such information of customers that do not do business in Massachusetts.*

*(b) See response to (a). Fibertech further objects to the extent this question calls for a legal conclusion.*

In this information request, SELP has merely asked whether agreements that Fibertech refers to throughout its direct case (*i.e.*, testimony of Lundquist and Chiaino) are privately-negotiated contracts. As set forth in its Complaint and throughout its direct case, Fibertech claims that its offering of dark fiber service to certain customers constitutes a "common carrier" service. *See e.g.*, Chiaino Testimony, p. 6, lines 16-19. No basis is provided for either Fibertech's position on this matter. As anyone familiar with regulatory terms knows, the term "common carrier" does not usually include entities that offer service only on individually-negotiated, contractual bases with differing terms. Since Fibertech argues that it is allegedly a "common carrier" and such status entitles it to attach to utility poles under G.L. c. 166, §25A, SELP is entitled to discover facts that would elucidate whether Fibertech in fact offers service on a "common carrier" basis, and if Fibertech is a "common carrier" subject to anyone's regulatory authority.

Finally, in this request, SELP merely asked whether or not the contracts referred to in Lundquist's (and Chiaino's) testimony are privately-negotiated (*i.e.*, as opposed to its dark fiber being offered to anyone on equal terms pursuant to a published tariff.) Fibertech's refusal to answer this question on the grounds that the information sought is competitively sensitive and therefore confidential is completely unjustifiable. Answering this simple question does not require Fibertech to reveal any competitively sensitive information about its operations or any customer. Because Fibertech has refused to answer this simple question, its response to subpart (b) is entirely non-responsive. Fibertech should be compelled to respond to these questions as they are entirely relevant to this proceeding.

## CONCLUSION

For the foregoing reasons, SELP's third motion to compel should be granted.

Respectfully submitted,

SHREWSBURY'S ELECTRIC LIGHT PLANT

By its attorneys

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Kenneth M. Barna  
Diedre T. Lawrence  
Rubin and Rudman LLP  
50 Rowes Wharf  
Boston, MA 02110  
Tel. No. (617) 330-7000

Dated: January 24, 2002

**CERTIFICATE OF COMPLIANCE**

I, Diedre Lawrence, counsel for Shrewsbury's Electric Light Plant, do hereby certify that beginning on January 3, 2002, and ending January 7, 2002, held telephone conferences with Kimberly Collins, Esq., counsel of record for Fiber Technologies Networks, LLC, for the purpose of attempting to narrow areas of disagreement on the very same discovery matters involved in this second motion to compel, and that, despite the good faith efforts of Shrewsbury's Electric Light Plant, no resolution has been reached as of the date of this third motion.

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Diedre T. Lawrence

